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Preliminary References by Public Administrative Bodies: When Are Public Administrative Bodies Competent to Make Preliminary References to the European Court of Justice?

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Under Article 234 of the EC Treaty a 'court or tribunal' of a Member State may refer questions on the interpretation and validity of Community law to the European Court of Justice. Article 234 does not define what is meant by a 'court or tribunal', but over the years the European Court of Justice has considered this notion in a large number of cases. It follows from these cases that not only bodies which under national law are designated as courts or tribunals can make a reference for a preliminary ruling. Also, in a number of instances, organs that generally qualify as public administrative bodies under national law may be competent to make references. This article identifies the relevant criteria for determining whether an organ is competent to make preliminary references and it examines what types of public administrative bodies that normally may make such references.

1. 'Court or Tribunal': What is in a Word?

It is well known that Article 234 of the EC Treaty institutes a system of preliminary references whereby a court or tribunal of a Member State may – and sometimes must – refer questions on the interpretation and validity of Community law to the European Court of Justice.[1] Article 234 itself does not define in more detail what is meant by a court or tribunal, but over the years, the European Court of Justice has considered this notion in a large number of cases.[2] It follows from these cases that the decision of what is a national body, which is entitled to make a reference, must be made on the basis of a uniform and independent definition under Community law, meaning that the definition does not refer to national law.[3] An important consequence of this is that not only bodies

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[1] In order to make it clear to the reader when I refer to the European Court of Justice and when to a national body, the former is generally referred to as 'the European Court of Justice' (and only rarely as the 'Court' or the 'Court of Justice'). References to national bodies are generally made to the 'court or tribunal' (as provided in Article 234) and sometimes to the 'national body' or the 'referring body'.

[2] See, in this connection, Moitinho de Almeida, 'La notion de juridiction d'un État membre (Art. 177 du traité CE)', in *Mélanges en hommage à Fernand Schockweiler*, eds Iglesias, Due, Schintgen, & Elsen, (Baden-Baden: Nomos Verlagsgesellschaft,1999), 477.

[3] See Advocate General Reichl's Opinion in Case 246/80, *Broekmeulen* [1981] ECR 2311, at 2335-2336.

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that are designated as courts or tribunals in national law can make a reference for a preliminary ruling. In a number of instances also, organs that generally will qualify as public administrative bodies under national law may be competent to make references. These years, we are witnessing a strong growth in the number of independent bodies that work in the grey area between administrative and judicial decisions, and it is therefore likely that in the foreseeable future, the number of preliminary references from such bodies to the European Court of Justice will increase significantly.

Below, I first examine the criteria that the European Court of Justice has taken into account to decide whether a body is a court or tribunal within the meaning of Article 234, and I consider the weighting that the Court gives to the different criteria. After this, I consider which public administrative bodies may be competent to make references under Article 234. I conclude the article with some critical remarks on how the Court of Justice has defined a court or tribunal within the meaning of Article 234.

2. The Criteria for Determining Whether a Body Qualifies as a Court or Tribunal Entitled to Make a Reference

Although there is no abstract definition of a court or tribunal in Article 234, it is nevertheless possible to deduce from the practice of the European Court of Justice a number of organizational and functional criteria that are relevant for determining when a body can make a reference under that provision. It follows from the Court of Justice's case law that not all criteria have to be met in order for a body to qualify as a court or tribunal that may refer preliminary questions. Some criteria carry considerable weight, whereas others carry only negligible weight, as will be shown below.

2.1. Is the body established by law?

The European Court of Justice has repeatedly stated that, when deciding whether a body qualifies as a court or tribunal, it is relevant whether it has been established by law.[4] The criterion is intended to ensure that the body has a sufficient legal basis. Thus, a body that was set up under an agreement or by a specific administrative decision cannot normally refer a question for a preliminary ruling.[5] On the other hand, it makes no difference whether the body was established by primary or subordinate legislation. Similarly, it does not matter if the body was established by a law that, at the same time, restricts its jurisdiction to the cases that the law concerns.[6]

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[4] Case 61/65, *Vaassen-Göbbels*, English special edition [1966] ECR 261 (original reference: Rec. 1966 377), 273; Joined Cases C-110 to 147/98, *Gabalfrisa*, [2000] ECR I-1577, para. 34; Case C-416/96, *Nour Eddline El-Yassini*, [1999] ECR I-1209, para. 18; Case C-54/96, *Dorsch Consult*, [1997] ECR I-4961, paras 24-25; and Joined Cases C-9/97 and C-118/97, *Jokela*, [1998] ECR I-6267, para. 19.

[5] There do not seem to be any decisions in which the European Court of Justice has refused to give a preliminary ruling solely on the grounds that the referring body was not established by law and therefore did not qualify as a court or tribunal for the purposes of Art. 234.

[6] Case 61/65, *Vaassen-Göbbels*, 273.

In the *Dorsch Consult* case concerning the award of public service contracts, the Commission argued before the European Court of Justice that the referring body had been set up under a framework budgetary law, which did not give rise to rights or obligations for citizens as legal subjects. The Commission also pointed out that the body in question was confined to reviewing decisions made by review bodies. However, in the field of public service contracts, there was no competent review body at that time. Moreover, according to the Commission, the body in question had no basis in law on which it could act. In its ruling, the European Court of Justice merely noted that the body had been established by the framework budgetary law, meaning that its establishment by law could not be disputed. Whether domestic legislation has conferred powers on the body in the specific area of public service contracts was immaterial.[7]

The *Dorsch Consult* case thus suggests that the criterion that a body must be established by law in order to qualify as a national court is primarily a formal requirement.

2.2. Does the body have a permanent character?

The European Court of Justice also seems to attach importance to whether the body is of a permanent character.[8] However, there does not seem to have been a decision of the European Court of Justice in which lack of permanence has been of decisive importance. In the great majority of cases, the body in question has had a permanent character, and in the few cases wherein this has not been so, there have also been other criteria that have told against the recognition of the body in question being considered a national court for the purposes of Article 234.

In its practice, the European Court of Justice has not made clear precisely what the content is of the requirement for permanence. However, it is natural to assume that the European Court of Justice will consider that this requirement for permanence is important and will not accept references for preliminary rulings from bodies that have been set up to resolve specific existing disputes.

2.3. Is the body independent?

In assessing whether a given body can be regarded as a court or tribunal, the European Court of Justice attaches weight to whether the legal basis for the body ensures that it has the necessary independence. On the other hand, the European Court of Justice does not seem to examine the personal independence of the individual members of the body in the actual case in connection with which a reference is made. Where the legal basis for a body does not ensure the necessary independence of *the body in general*, it will probably not be relevant whether or not in *the actual case referred*, there is a problem of independence. The independence criterion is particularly significant in cases

[7] Case C-54/96, *Dorsch Consult*, paras 22-38.
[8] Case 61/65, *Vaassen-Göbbels*; Case 246/80, *Broekmeulen*, para. 3; and Case C-54/96, *Dorsch Consult*, para. 26.

wherein there is a reference from a body that exists on the borders between judicial and administrative bodies. For example, the European Court of Justice has refused to accept references from appeal tribunals where these have been too closely connected with the administrative authority whose decisions the tribunal deals with. This was the situation in the *Schmid* case. Here the European Court of Justice refused to give a preliminary ruling on a question referred by an appeal chamber, as the Court of Justice found that the appeal chamber was insufficiently independent from the authority whose decisions the appeal chamber considered. There were both an organizational and a functional link between the appeal chamber and the regional finance authority that rendered the decisions that were contested before the appeal chamber. Thus, the appeal chamber could not be considered a court or tribunal within the meaning of Article 234.[9]

Further clarification of the independence criterion was also given in the *Wilson* case, which concerned the interpretation of the term court or tribunal in Directive 98/5/EC. When defining this term, the European Court of Justice applied the practice established with regard to Article 234 of the EC Treaty, and to do this, it was necessary to clarify the concept of independence. In this respect, the European Court of Justice observed that independence primarily involves an authority acting as a third party in relation to the authority that has adopted the contested decision. Moreover, the concept has an external aspect and an internal one. The external aspect presumes that the body is protected against external intervention or pressure that may threaten the independent judgment of its members with regard to proceedings before them. This requires sufficient guarantees to protect those who have the task of adjudicating a dispute, such as guarantees against removal from office. With regard to the internal aspect, the European Court of Justice observed that independence is linked to impartiality, and it is intended to ensure that there is a level playing field for the parties to the proceedings and their interests with regard to the subject matter of those proceedings. This aspect requires impartiality and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Guarantees of independence and impartiality require rules, particularly with regard to the composition of the body and appointments to it; length of service; and the grounds for abstention, rejection, and dismissal of its members, in order to remove any doubt as to the imperviousness of that body to external pressure and its neutrality with respect to the interests before it.[10]

According to Advocate General Stix-Hackl, it is not sufficient that there is a general principle that the members of a body that makes decisions should be independent. Thus, she has stated that, in order to qualify as a court or tribunal within the meaning of

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[9] Case C-516/99, *Schmid* [2002] ECR I-4573, paras 34-44. On this case, see Gori, 'La notion de juridiction d'un État membre au sens de l'article 234 CE', in *Claus Gulmann Liber Amicorum*, ed. Fenger, Hagel-Sørensen, & Vesterdorf, (Copenhagen: Forlaget Thomson, 2005), 155, 180 et seq.; and Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', CMLRev 40 (2003): 9, 32 et seq. See also Case C-53/03, *Syfait* [2005] ECR I-4609, paras 32-33; and Advocate General Jacobs' Opinion in Case C-465/03, *Kretztechnik v. Finanzamt Linz* [2005], ECR I-4357, para. 23.

[10] Case C-506/04, *Wilson* [2006], ECR I-8613, paras 49-53. In the actual case, the European Court of Justice found that the national body did not seem to have sufficient guarantees of impartiality.

Article 234, it must be a condition that the independence is secured by specific provisions concerning rejection or abstention of the members of the body with regard to a case.[11] In its practice, the Court of Justice seems to have adopted a less strict interpretation as is apparent from its judgment in the *Emanuel* case. Here an Appointed Person had been appointed by the Lord Chancellor. As long as the Appointed Person carried out his functions, he was given the same guarantees of independence as judges in general. However, the Appointed Person could be dismissed if certain specified conditions were fulfilled, and it was up to the Lord Chancellor to decide whether this was the case. Advocate General Colomer, in his opinion in the case, expressed the view that the scope for making such a dismissal was exceptional and must be interpreted restrictively, and he therefore found that there was no doubt that the Appointed Person was independent. The European Court of Justice did not even consider it necessary to address this issue itself but instead went straight on to deal with the substantive question referred.[12]

2.4. Is the jurisdiction of the body compulsory?

The European Court of Justice also considers it important that the jurisdiction of the body in question should be compulsory. This criterion has three different aspects. First, this means that the decision of the national body must be binding on the parties.[13] Second, the European Court of Justice has found that the criterion of compulsion is fulfilled where it is not possible to go to some other body to have the dispute settled.[14] Third, the European Court of Justice has established that compulsory jurisdiction presumes that the parties cannot themselves choose whether the case should be dealt with by the body in question.[15]

2.5. Does the body use adversary procedure?

Where a national body uses adversary procedure, this will usually be an argument in favour of the body being considered a national court.[16] While adversary procedure is generally used by bodies belonging to the Member States' judicial systems, such procedure is less widespread within the national administrative systems. However, as will

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[11] See Advocate General Stix-Hackl's Opinion in Case C-506/04, *Wilson*, para. 50.

[12] Case C-259/04, *Emanuel* [2006], ECR I-3089, para. 24, and the Advocate General's Opinion in the same case, para. 30.

[13] Joined Cases C-110/98 to 147/98, *Gabalfrisa*, para. 36. See also Case C-161/03, *Samsung Electronics France*, order of 11 Jul. 2003 (unpublished), para. 15; and Case C-411/00, *Felix Swoboda* [2002], ECR I-10567, paras 24-28.

[14] Joined Cases C-110/98 to 147/98, *Gabalfrisa*, para. 35, according to which the decisions of the tax authority could be challenged before the administrative courts only after appeal proceedings had been brought before the Tribunales Económico-Administrativos. The jurisdiction of the Tribunales was thus compulsory. However, compare this with Case C-259/04, *Emanuel*, paras 21-22, where the plaintiff had a choice between two national courts, and Case 246/80, *Broekmeulen*, para. 15, where in principle, it was possible to challenge a given decision before the ordinary national courts, rather than before the referring appeals committee – though this had never happened in practice. The appeals committee was nevertheless considered to be a national court for the purposes of Art. 234.

[15] Case 102/81, *Nordsee* [1982], ECR 1095, paras 7-16.

[16] Case 61/65, *Vaassen-Göbbels*, 273.

be explained in Section 2.10 below, this criterion is only attributed limited weight and adversary procedure certainly is not an absolute condition for a body to be allowed to make a reference for a preliminary ruling. For example, in the *Simmenthal* case, an undertaking had brought a case against the Italian authorities with a view to recovering previously paid fees. The case had been dealt with in summary proceedings, where judgment was given solely on the basis of the allegations presented by the plaintiff. Only if the other party raised objections to the decision would there have been adversarial proceedings. The European Court of Justice ruled that Article 234 did not require that the preliminary ruling should be referred in connection with an adversarial procedure, but it added that it may prove to be in the interests of the proper administration of justice that a question should be referred for a preliminary ruling only after both sides have been heard.[17]

2.6. Does the body take its decisions on the basis of legal rules?

The European Court of Justice has also emphasized that to qualify as a court or tribunal within the meaning of Article 234, a body must make its decisions on the basis of legal rules.[18] Obviously, this criterion will be satisfied in the great majority of cases that are referred to the European Court of Justice.

The criterion that a body must decide on the basis of legal rules has also been considered where there was no doubt that the referring body would decide the substance of the main proceedings upon the basis of legal rules, but where it was questioned whether the procedural rules applied in reaching the substantive decision, could be qualified as legal rules. This problem is likely to be particularly relevant in respect of public administrative bodies as is apparent from the *Dorsch Consult* case. In this case, the objection was based on the fact that the referring body itself had adopted the rules of procedure in question and that these rules of procedure did not take effect in relation to third parties and had not been published. The European Court of Justice found that, even in this situation, the criterion that the referring body must decide on the basis of legal rules can be satisfied.[19]

The significance of the criterion that the body must make its decisions on the basis of legal rules is not clear. This requirement will be fulfilled if the referring body is to decide the main proceedings on the basis of purely national rules and possibly also if the body is to decide the case on the basis of international rules. Obviously, the criterion will also be fulfilled if the referring body is to decide the main proceedings on the basis of Community rules. Indeed, a preliminary question is only admissible if it concerns the interpretation or validity of a Community rule that is to be applied in the national body's

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[17] Case 70/77, *Simmenthal* [1978], ECR 1453, paras 9-11. See similarly Joined Cases C-277/91, C-318/91, and C-319/91, *Ligur Carni* [1993], ECR I-6621, paras 15-16; Case C-54/96, *Dorsch Consult*, para. 31; and Case C-17/00, *De Coster* [2001], ECR I-9445, para. 14.

[18] Joined Cases C-110/98 to 147/98, *Gabalfrisa*, para. 38.

[19] Case C-54/96, *Dorsch Consult*, paras 32-33.

decision of the main proceedings. This, it is submitted, presupposes that the referring body intends to take account of Community law, thereby making it difficult to imagine a situation where the referring body does not fulfil the criterion that its decision must be made on the basis of legal rules while at the same time it requires an interpretation of some community rule in order to be able to decide the main proceedings. Nevertheless, the European Court of Justice has referred to the criterion on several occasions.

2.7. Must the members of a referring body be lawyers?

As stated in the previous section, the European Court of Justice attaches importance to whether the body takes its decisions on the basis of legal rules. However, it is less certain what importance (if any) the European Court of Justice attaches to whether the body's members are lawyers. There is no question that the European Court of Justice does not require all the members of a body to have a legal background. The question remains, however, whether a body can qualify as a court or a tribunal if its rules do not require that at least some of its members are judges or other persons with legal qualifications.

In the *Broekmeulen* case, the Dutch Appeals Committee for General Medicine (*Commissie van Beroep Huisartsgeneeskunde*) referred a question to the European Court of Justice. Three of the Appeals Committee's members, including the chairman, were appointed by two ministers, three members were appointed by the Dutch medical faculties, and three members were appointed by the Royal Netherlands Society for the Promotion of Medicine. The chairman should preferably have been a high-ranking judge. Thus, it was not a condition that any of the members of the Appeals Committee should have had a legal qualification. The European Court of Justice nevertheless found that the Appeals Committee constituted a national court for the purposes of Article 234.[20]

Although according to the *Broekmeulen* case, it is possible that there is no absolute requirement for the members of a referring body to be lawyers, it seems likely that in cases of doubt, the European Court of Justice will take into account how many of the members have legal qualifications as lawyers or judges when deciding whether a body qualifies as a court or a tribunal for the purposes of Article 234.[21]

2.8. Does the question arise in connection with the settlement of a dispute?

The purpose of Article 234 is that the European Court of Justice should assist national courts with the interpretation of community law in connection with the referring bodies' decisions on disputes, so that full effect should be given to community law. For

[20] Case 246/80, *Broekmeulen*. See also Case C-416/96, *Eddline El-Yassini*, para. 21, of the Advocate General's Opinion, and Case C-7/97, *Bronner* [1998], ECR I-7791 (two out of three of the referring body's members were not lawyers).

[21] The criterion that it should be relevant how many of the appointees of the body possess qualifications as lawyers or judges was proposed by Advocate General Jacobs in his Opinion in Case C-53/03, *Syfait*, paras 26 and 33.

this reason, unless the case in question concerns the settlement of a dispute, the European Court of Justice does not have jurisdiction under Article 234.[22] This applies regardless of whether, according to its *organizational* characteristics, the body is classified as a court or a tribunal according to the above criteria.

2.9. Are there other judicial solutions to the conflict in question?

The preliminary ruling procedure is intended to give full effect to community law in the Member States. The strength of the system lies in the fact that at least the more important disputes often – though far from always – find their way to the Member States' ordinary national courts at one point or another. If the dispute involves a question of a community law character, this opens up the possibility of the question being referred to the European Court of Justice.

However, in certain situations, a dispute can in practice solely be brought before bodies that can only with difficulty be regarded as being a court or a tribunal within the meaning of Article 234. This is particularly relevant with regard to a number of the Member States' public administrative decision bodies. In the *Broekmeulen* case, where there was in reality no possibility of appeal to the Member State's judicial organs, this situation was put before the European Court of Justice. Here the Court of Justice showed itself willing to regard the decision-making body as being entitled to make a reference for a preliminary ruling. The alternative would be that the Court of Justice would not have the opportunity to decide on problems of community law to which such cases might give rise.[23]

It remains to be seen how far the European Court of Justice will stretch the ratio in the *Broekmeulen* case. In the present author's opinion, it should not be stretched too far. Hence, I subscribe to the view of Advocate General Tesauro that '[i]f a body is not a judicial body, it does not become one simply because there is no better solution'.[24] In other words, the fact that there is no other judicial solution to the dispute in question should not, in itself I submit, mean that a decision-making body qualifies as a court or a tribunal within the meaning of Article 234.

2.10. Weighting of the criteria

As stated above, there is no abstract definition of a court or a tribunal for the purposes of Article 234, and it is not possible to derive an unambiguous definition from the European

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[22] Case 138/80, *Borker* [1980], ECR 1975, para. 4; Case 318/85, *Greis Unterweger* [1986], ECR 955, para. 4; and Case C-256/05, *Telekom Austria*, unpublished judgment of 6 Oct. 2005, paras 10-12.

[23] See, e.g., Case 246/80, *Broekmeulen*, paras 16-17.

[24] See para. 40 of the Opinion of Advocate General Tesauro in Case C-54/96, *Dorsch Consult*. Compare, however, with Gori, 161.

Court of Justice's judgments.[25] Nevertheless, the practice of the European Court of Justice suggests that some of the criteria referred to are considered more important than others. Thus, the European Court of Justice seems to work on the assumption that a referring body will be a court or tribunal as long as this body is part of a Member State's ordinary court system, and the reference is made as part of judicial proceedings that are intended to lead to the settlement of a dispute. Where the European Court of Justice cannot rely on this assumption, it will normally make a more detailed assessment of the organizational and functional criteria referred to above.[26] It is not clear whether these criteria constitute an exhaustive list or whether it is possible that further criteria may be included. Also, the practice of the European Court of Justice does not provide any basis for ascribing an absolute value to any of the individual criteria.

In making its assessment, the European Court of Justice gives special weight to whether the reference is made as part of judicial proceedings that are to lead to the settlement of a dispute.[27] If this is not the case, the European Court of Justice will almost certainly refuse to accept the reference.

If the reference is made as part of judicial proceedings that are to lead to the settlement of a dispute but the referring body is not part of a Member State's ordinary court system, the European Court of Justice will consider it particularly important whether the body is independent[28] and whether it has compulsory jurisdiction. Correspondingly, it is to be expected that the European Court of Justice will reject references from bodies that are only set up with a view to resolving a particular individual dispute or that are not established by law.

The criteria concerning an adversarial procedure, that the body should make its decisions on the basis of legal rules, and there should not be any other possibility for resolving the dispute in question have all been given less weight and seem only to play a role in cases where the other criteria do not point in a particular direction. The last criterion, on the extent to which the members of the body are lawyers, has hitherto only been proposed by Advocate General Jacobs but not by the European Court of Justice itself. It thus remains unclear whether the European Court of Justice will follow its Advocate General and attach any weight to it at all.[29]

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[25] See Tridimas, 27. See also Oliver, 'La recevabilité des questions préjudicielles: La jurisprudence des années 1990', *Cahiers de droit européen* 37 (2001): 15, 17. Oliver observes that the European Court of Justice has never expressed itself on the relative weighting of the criteria that are relevant in assessing whether a given body can refer a question for a preliminary ruling under Art. 234.

[26] Case C-192/98, *ANAS* [1999], ECR I-8583, paras 2-25, and Case C-440/98, *RAI*, [1999] ECR I-8597, paras 11-16.

[27] See Gori, 173, and Tridimas, 28.

[28] According to Anagnostaras, 'Preliminary Problems and Jurisdiction Uncertainties: The Admissibility of Questions Referred by Bodies Performing Quasi-judicial Functions', ELRev 30 (2005): 883; it is 'usually the independence criterion that determines the admissibility issue'.

[29] The independence criterion, which is now given considerable weight, was originally put forward by Advocate General Gand in 1966 in Case 61/65, *Vaassen-Göbbels*, 281. It was not until 1987 (i.e., more than twenty years later) that the European Court of Justice itself referred to this criterion in Case 14/86, *Pretore di Salò* [1987], ECR 2545, para. 7. See also in this regard Advocate General Colomer's Opinion in Case C-17/00, *De Coster*, para. 17.

3. What Public Administrative Bodies May Refer Preliminary Questions?

3.1. General observations

As a clear general rule, administrative authorities do not have a right to refer questions for preliminary rulings under Article 234 of the Treaty. A superior administrative body cannot be regarded as a court or tribunal in relation to the assessment of decisions that are taken by a subordinate administrative body and where the superior body would itself be a party to the case if the decision were brought before a national court.

A fine illustration of how the European Court of Justice distinguishes between a court or tribunal and an administrative authority has been given in the *Corbiau* case concerning the question whether the Luxembourg *directeur des contributions* could make a preliminary reference. On the one hand, the *directeur des contributions* was regarded as a court under Luxembourg law. Furthermore, the *directeur des contributions* exercised his functions within the framework of a national law. The requirement for the body to have a permanent character was also satisfied. On the other hand, the *directeur des contributions* was under the immediate authority of the Minister for Finance. It seemed from the case that the task of the *directeur des contributions* was to decide disputes between the administration, of which he was the head, and taxpayers who challenged the decisions that one of his officers had made. If a taxpayer were to choose to appeal against the decision of the *directeur des contributions* to the *Conseil d'État*, in many cases, it would be the *directeur des contributions* who would plead before the *Conseil d'État* in support of the administration of which he was head. Especially the fact that the *directeur des contributions* was head of the authority that had taken the decision that was the subject of the appeal led the European Court of Justice to the finding that the *directeur des contributions* could not be regarded as being impartial in relation to this authority. The Court of Justice therefore refused to allow a substantive hearing of the question.[30]

Another more recent example has been given in the *Syfait* case where the Greek Competition Commission (*Epitropi Antagonismou*) referred a question for a preliminary ruling. The Competition Commission was permanently established by law, it made judicial decisions on the basis of legal rules, and it had sole competence to impose penalties for infringements on Greek competition law. The Competition Commission had nine members, appointed for three-year periods. Four members were appointed on the nomination of trade union and commercial organizations, one was required to be an academic economist, one was required to be an academic lawyer, one was to be from the Greek State's court service, and the last two were to be persons of recognized reputation and relevant experience. The law laid down that the members were to benefit from independence in their work for the Competition Commission. There was a secretariat associated with the Competition Commission. This secretariat was responsible for the investigation of cases and the preparation of recommendations to the Competition

[30] Case C-24/92, *Corbiau* [1993], ECR I-1277, paras 14-17. Other important illustrations have been given in Case C-516/99, *Schmid*, paras 34-44, and Case C-109/90, *Giant* [1991], ECR I-1385.

Commission for its decisions. The chairman of the Competition Commission was the head of the secretariat and was thus formally responsible for its management. However, in its reference to the European Court of Justice, the Competition Commission stated that the secretariat acted independently of the Competition Commission itself, but no reference was made to rules or procedures, which ensured this independence. The European Court of Justice found that the Competition Commission did not qualify as a court or tribunal within the meaning of Article 234. In support of this finding, it referred to four factors of which three concerned the Competition Commission's independence. First, the European Court of Justice stated that the Greek Minister for Development was empowered to review the lawfulness of the decisions of the Competition Commission. Second, there were no particular safeguards in respect of the dismissal or the termination of the appointment of the members of the Competition Commission. Third, there was a functional link between the Competition Commission and its secretariat, so it was not a clearly distinct third party in relation to the State body, which, by virtue of its role, may be akin to a party in the course of competition proceedings. As the fourth factor, the European Court of Justice argued that the European Commission had powers to remove the jurisdiction of the Greek Competition Commission in a given case so that the proceedings initiated before that authority would not lead to a decision of a judicial nature.[31] On the basis of the above observations, the Court of Justice declined to answer the preliminary question submitted by the Greek Competition Commission.

The European Court of Justice's reasoning in the *Syfait* case seems to indicate a certain tightening up of the requirements for national bodies that can use the procedure in Article 234.[32] In the following, I consider in what situations that administrative bodies will be able to make a reference for a preliminary ruling.

3.2. Administrative appeal boards

Administrative appeal boards can satisfy the conditions for being considered a court or tribunal for the purposes of Article 234, even if they are considered administrative bodies under national law.[33] Thus, on several occasions, the European Court of Justice has given preliminary rulings on questions referred by Member States' public procurement review boards.[34]

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[31] Case C-53/03, *Syfait*, paras 29-37, but compare this with paras 26-32 in the Advocate General's Opinion. This case has prompted some discussion in the legal literature, see among others Komninos, 'Article 234 EC and National Competition Authorities in the Era of Decentralisation', ELRev (2004): 106.

[32] See Advocate General Colomer's Opinion in Case C-259/04, *Emanuel*, para. 26, and Anagnostaras, 890.

[33] Case C-416/96, *Eddline El-Yassini*, paras 16-22; joined Cases C-9/97 and C-118/97, *Jokela*, paras 17-24; Joined Cases C-110/98-C-147/98, *Gabalfrisa*, paras 33-41; Case C-407/98, *Abrahamson* [2000], ECR I-5539, paras 28-38; and implicitly Case C-361/97, *Nour* [1998], ECR I-3101. With particular regard to EEA law, see Case E-1/94, *Restamark*, report of the EFTA Court 1994-1995, 17, concerning a request for a preliminary ruling from the Appeals Committee at the Finnish Board of Customs (*Tullilautakunta*).

[34] Case C-275/98, *Unitron Scandinavia* [1999], ECR I-8291 (the Danish Procurement Review Board); Case C-54/96, *Dorsch Consult* (the German Federal Public Procurement Awards Supervisory Board); Case C-92/00, *HI* [2002], ECR I-5553 (the Public Procurement Review Chamber of the Vienna Region); and Case C-411/00, *Felix Swoboda* (the Austrian Federal Public Procurement Office).

In order to establish whether an appeal board qualifies as a court or tribunal, the European Court of Justice makes a factual assessment of whether there is the necessary independence, where it is the totality of the national rules for securing this independence that is decisive. On the other hand, it is not important whether the rules are laid down in one or another law.[35]

In practice, it may be difficult to determine whether an appeal board has such independence that it can be regarded as a court or tribunal for the purposes of Article 234. Moreover, even minor changes in the rules of procedure for an already established board can mean that it either gains or loses the right to make references for preliminary rulings.[36]

How difficult it is to establish whether an appeal board has the necessary independence to qualify as a court or tribunal was seen in the *Köllenberger and Atzwanger* case. Here Advocate General Saggio reviewed the rules that regulated the independence of the members of the Public Procurement Office of the Land of Tyrol. The Advocate General found that the national rules were so vague that they did not sufficiently protect the members of the office from undue interference. This led the Advocate General to conclude that the body did not have such independence as to enable it to be classified as a court or tribunal. The European Court of Justice arrived at the opposite conclusion. First, it made a review of the provisions that were relevant to the members' independence and found that these provisions taken together could not support the conclusion reached by the Advocate General. As for the possibility of improper interference, the European Court of Justice added that it is not for it to infer that the provisions for the removal of the members of a body, such as the Public Procurement Office of the Land of Tyrol, would be applied in a manner contrary to the Austrian constitution and the principles of a State governed by the rule of law.[37]

The judgment in the *Köllenberger and Atzwanger* case illustrates that, in relation to the independence criterion, there seems to be an assumption that a Member State will respect the independence of a review board.[38] There are thus limits to how closely the European Court of Justice will examine the provisions that may be relevant to formal independence.[39]

3.3. Advisory bodies

An advisory body, which only has the task of giving its opinion as part of an administrative process, does not constitute a court or tribunal of a Member State. This is the case regardless of whether the members of the body are representatives of public or private

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[35] See Case C-54/96, *Dorsch Consult*, para. 34.

[36] If a board changes from being responsible for processing and deciding cases as well as reviewing others' decisions to only making review decisions, this may well mean that it will become entitled to make references.

[37] Case C-103/97, *Köllensperger and Atzwanger* [1999], ECR I-551, para. 19-24.

[38] See Tridimas, 29, who describes the judgment in the *Köllensberger and Atzwanger* case as being a relaxation in relation to previous practice.

[39] Case C-407/98, *Abrahamson and Anderson* [2000], ECR I-5539, paras 36-37.

interests, regardless of whether they have legal training or may even act as judges in other contexts, and regardless of whether the members of the body are given absolute independence in carrying out their tasks. Thus, for example, in the *Greis Unterweger* case, the Italian Consultative Commission for Currency Offences (*Commissione Consultiva per le Infrazioni Valutarie*) referred a number of questions to the European Court of Justice. The job of the Consultative Commission was to give reasoned advisory opinions to the Italian Treasury Minister on the sanctions that could be imposed on persons who breached the Italian foreign currency regulations. Since the Consultative Commission did not resolve disputes, the European Court of Justice declined to answer the questions.[40]

However, in certain situations, the European Court of Justice has been willing to regard a body as being covered by Article 234 if, while formally the body only gives advisory opinions, in fact its opinions are relied upon in normal circumstances, so that it does in reality resolve the given dispute.

Hence, in the *Garofalo* case, a group of doctors brought an 'extraordinary petition' against an administrative decision. The petition was made to the Italian Minister for Health, who asked the Italian Council of State (*Consiglio di Stato*) for its opinion. With a view to giving such an opinion, the Council of State referred some questions to the European Court of Justice, but the Council of State was in doubt about whether it qualified as a court or tribunal for the purposes of Article 234. The Council of State had two different functions. First, it gave rulings in second and final instance on appeals against judgments of regional administrative courts in proceedings concerning administrative acts. In respect of this function, it was not disputed that the Council could make references for preliminary rulings. Second, the Council of State gave opinions in relation to extraordinary petitions. It was as part of this function that the Council of State referred questions to the European Court of Justice in the actual case. The European Court of Justice found that the proceedings of the Council of State in dealing with cases in connection with extraordinary petitions corresponded in all important respects to the proceedings of a court. As far as extraordinary petitions were concerned, a reference to the Council of State was compulsory, and its opinion, based solely on the application of rules of law, formed the basis for a decision that was formally adopted by the President of the Italian Republic. Such an opinion was an integral part of a procedure, which was the only one capable of resolving a dispute between private individuals and the administration. A decision that did not conform with the opinion of the Council of State could be adopted only after deliberation within the Italian Council of Ministers and had to be duly reasoned. On this basis, the European Court of Justice found that the Council of State was a national court for the purposes of Article 234 of the EC Treaty.[41]

Another case that must be mentioned in this context is the *Nederlandse Spoorwegen*, which concerned a reference for a preliminary ruling by The Netherlands Council of

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[40] Case 318/85, *Greis Unterweger*, para. 4.

[41] Joined Cases C-69/96 to C-79/96, *Garofalo* [1997], ECR I-5603, paras 17-27. See also Lasok, *The European Court of Justice – Practice and Procedure*, 3rd edn (London: Butterworths, 2006), 556.

State (*Raad van State*). Formally, this was only an advisory body for the Crown (i.e., the Netherlands head of State) in the area of administrative cases, which was the area concerned in the case in question. Nevertheless, the European Court of Justice chose to give a preliminary ruling. In its judgment, the Court of Justice did not address the question of whether the Netherlands Council of State was entitled to refer questions for preliminary rulings, but in his Opinion, the Advocate General pointed out that the procedural guarantees and the powers of the referring department of the Council of State and the Crown and the powers to annul administrative acts must lead to the conclusion that the body was in effect a national court.[42]

The *Garofalo* and *Nederlandse Spoorwegen* cases indicate that the European Court of Justice is prepared to allow the highest national constitutional bodies to make references for preliminary rulings. Presumably, there are reasons to be cautious about applying the European Court of Justice's reasoning in these cases to other national bodies that do not have a similar supreme position in constitutional law.

3.4. Ombudsmen

In general, the Member States' ombudsmen do not have compulsory jurisdiction. If a citizen files a complaint against a public authority with the national ombudsman, the public authority, as a general rule, is not legally obliged to comply with the ombudsman's subsequent opinion on the case.[43] Neither can the successful complainant require the Member State's judiciary to enforce the opinion. If a public authority does not comply with an ombudsman opinion, the only legal remedy will normally be to sue the authority before the ordinary courts in order to have these decide the case.[44] It follows that ombudsmen will normally not be competent to refer preliminary questions to the European Court of Justice.[45] However, in a number of instances, the workings of ombudsmen resemble those of an administrative court and generally the public authorities duly comply with ombudsman opinions. Hence, there is a need for the national ombudsmen to be able to obtain authoritative advice on the correct interpretation of Community law. To some extent, this need may be met by the possibility of requesting written answers from the European Ombudsman.[46] Nevertheless, such written answer does not have the same legal authority as does a preliminary ruling. *De lege ferenda*, it is therefore submitted that where an ombudsman is required to undertake interpretation of Community law as part of his

[42] Case 36/73, *Nederlandse Spoorwegen* [1973], ECR 1299 (see in particular the Advocate General's Opinion, 1317-1320).

[43] This is not to say that national law may not oblige the public authority to take part in the procedure leading up to the ombudsman's decision.

[44] As part of such court proceedings, the plaintiff may produce the ombudsman decision in support of his/her pleas.

[45] However, compare with Rasmussen, in Report of the 9th FIDE Conference, London (Sep. 1980), vol. 1, 313. Anderson & Demetriou, *References to the European Court*, 45, refer to ombudsman institutions as 'borderline cases'.

[46] See statement adopted at the Sixth Seminar of the National Ombudsmen of EU Member States and Candidate Countries, Strasbourg 14-16 Oct. 2007, <www.ombudsman.europa.eu/liaison/en/statement.htm>.

examination of a complaint, the institution should be allowed the possibility of making a preliminary reference to the European Court of Justice.

4. Some Critical Remarks

Above, it has been shown that while there is no abstract definition of what is meant by the terms court or tribunal in Article 234 of the EC Treaty, this is not so much of a problem. Rather, the problem is that the criteria that may be extracted from the case law of the Court of Justice are rather vague, leaving an impression of real legal uncertainty.[47]

With particular regard to the question when public administrative bodies of the Member States are competent to refer, one problem regarding the criteria call for particular attention, namely, the requirement that the referring body must be 'independent'. This criterion was only recognized by the European Court of Justice in 1987 but has since established itself as the decisive factor in a large proportion of those cases where there has been uncertainty as to whether the referring body could be viewed as a court or tribunal. The increased importance of the independence criterion is to a considerable extent due to the growth in the number of public review boards and other Member State bodies that equally work in the grey area between administrative and judicial decision making. As is clear from the examination in this article, the independence criterion is surrounded by considerable uncertainty, which is not least reflected in the fact that, in several cases, the conclusion of the Court of Justice conflicts with that of its Advocate General on precisely the construction of the independence criterion. Clarification of the contents of this criterion may therefore be of considerable practical importance.

[47] Or, in the words of Advocate General Colomer, the Court of Justice's case law on the matter is 'casuistic, very elastic and not very scientific', see his Opinion in Case C-17/00, *De Coster*, para. 14.